

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

URBAN OUTFITTERS, INC.,

Plaintiff,

v.

DERMODY OPERATING COMPANY,
LLC, *et al.*,

Defendants.

Case No. 3:21-cv-00109-MMD-CLB

ORDER

I. SUMMARY

This is a breach of contract action involving the construction of a fulfillment and distribution center. In its amended complaint (ECF No. 65 (“FAC”)), Plaintiff Urban Outfitters, Inc. (“Urban”) brings claims against Defendants Dermody Operating Company, LLC (“Dermody”), the project developer, United Construction Corporation (“United”), the general contractor, and GAF Materials Corporation (“GAF”), the manufacturer of roofing materials for the project. As pertinent here, the FAC asserts four claims against GAF: consumer fraud; deceptive trade practices; civil conspiracy; and civil aiding and abetting. (*Id.* at 18-27.) Before the Court is GAF’s motion to dismiss (ECF No. 89 (“Motion”)) these claims.¹ Because Urban has failed to plead facially plausible claims, and as further explained below, the Court will grant the Motion but will grant Urban leave to amend its claims.

II. BACKGROUND

The Court adapts the following allegations from the FAC. Urban contracted with Defendants Dermody and United on May 11, 2011, for the construction of a warehouse,

¹Urban filed a response (ECF No. 96), and GAF filed a reply (ECF No. 97).

1 distribution, and fulfillment center (the “Center”) in Reno, Nevada. (ECF No. 65 at 3.)
2 Urban agreed to pay Dermody and United \$25,540,253.00 for the Center, which would
3 encompass approximately 462,720 square feet, as well as associated driveways, parking
4 areas, on-site utilities, and landscaped areas. (*Id.*) Dermody and United agreed to be
5 responsible for all errors and omissions committed by Dermody or United, along with any
6 architects, subcontractors, and their agents and employees. (*Id.* at 4.) Defendant GAF
7 manufactured the materials used in the design and installation of the Center’s roof and
8 provided a 10-year guarantee to Urban for the materials and workmanship related to
9 installation. (*Id.* at 24-25.) The construction was substantially completed on January 31,
10 2012, and Urban took occupancy on February 2, 2012. (ECF Nos. 13-2, 13-3.)

11 Urban alleges that sometime around October 2019, the Center’s roof sustained
12 significant damage, which Urban initially believed to be the result of excessive rainfall.
13 (ECF No. 65 at 8.) The damage included weakened roof decking, punctures in the roof
14 membrane due to loosened fasteners, and water damage through the punctures, cracks,
15 and joints. (*Id.*) Urban hired Sean Wagner of NewStudio Architecture, LLC, to examine
16 the damage and investigate its cause. (*Id.*) Wagner conducted a site visit on September
17 9-12, 2019, and prepared a report dated October 4, 2019. (ECF No. 1-1 at 44-46.) Wagner
18 concluded that the damage was not in fact caused by a one-time weather event but was
19 rather attributable to conditions “not taken into consideration in the original design and
20 construction” of the Center. (ECF No. 65 at 8-9.)

21 Urban further alleges that the October 2019 roof damage stems from defects in
22 the Center’s original roof construction in 2011. (ECF No. 65 at 21-22.) In 2011, while the
23 building was still under construction, the roof first suffered wind damage due to United’s
24 defective installation of skylights. (*Id.* at 7.) After it finished construction, United began
25 performing repairs on the Center’s roof. (*Id.*) United consulted with GAF, the manufacturer
26 of the roofing materials, to formulate a repair plan for the wind damage. (*Id.* at 21, 25.)
27 GAF assessed the original roof design and then shared its findings with United’s roofing
28 subcontractor in a letter dated January 24, 2013. (*Id.*) In the letter, GAF acknowledges

1 that the roof “did not meet contractual requirements,” due to issues like incorrect roof
2 decking used with GAF’s roof assemblies as well as an insufficient moisture barrier. (*Id.*
3 at 21-22.) The Center’s defective roof installation would have required “complete removal
4 and replacement of the nearly completed roof at significant cost to both GAF and [United]”
5 and “would void the GAF guarantee.” (*Id.* at 25.) Urban alleges, however, that GAF failed
6 to disclose this fact to Urban and, as a result, Urban did not know of GAF’s letter until
7 April 2021, eight years later. (*Id.* at 22.) In particular, Urban’s fraud-based claims arise
8 from a June 2015 letter it received from GAF. (*Id.* at 21-22, 25-26, 27.) In this letter, GAF
9 characterized the roof as “repaired” “without disclosing their knowledge that the roof did
10 not meet contractual requirements” back in 2013. (*Id.* at 22.) Urban alleges that GAF knew
11 that its statement confirming the roof’s repaired status was false. (*Id.*)

12 Urban initially filed suit against Defendants Dermody and United, alleging breach
13 of contract and related causes of action. (ECF No. 1.) Both Dermody and United moved
14 to dismiss Urban’s initial complaint, arguing that Nevada’s statutes of repose and
15 limitations barred Urban from pursuing its claims. (ECF No. 10.) Urban then opposed the
16 motions to dismiss and sought to file an amended complaint to add claims and parties to
17 its lawsuit. (ECF Nos. 20, 22, 34.) In November 2021, the Court denied Defendants’
18 motions to dismiss and granted Plaintiff leave to file an amended complaint. (ECF No. 63
19 at 1-2.) Urban then filed the FAC, which includes four claims against newly added GAF.
20 (ECF No. 65 at 18-27.)

21 GAF now moves to dismiss the claims asserted against it, arguing that Urban fails
22 to state its fraud-based claims with particularity under Federal Rules of Civil Procedure
23 12(b)(6) and 9(b). (ECF No. 89 at 2-3.) Urban opposes GAF’s motion to dismiss and
24 argues that it has pleaded facially plausible claims. (ECF No. 96.)

25 **III. LEGAL STANDARD**

26 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
27 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide
28 “a short and plain statement of the claim showing that the pleader is entitled to relief.”

1 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
2 Rule 8 does not require detailed factual allegations, it demands more than “labels and
3 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*
4 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). “Factual allegations
5 must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to
6 survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a
7 claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
8 U.S. at 570).

9 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
10 apply when considering motions to dismiss. First, a district court must accept as true all
11 well-pleaded factual allegations in the complaint; however, legal conclusions are not
12 entitled to the assumption of truth. *See id.* at 678. Mere recitals of the elements of a cause
13 of action, supported only by conclusory statements, do not suffice. *See id.* Second, a
14 district court must consider whether the factual allegations in the complaint allege a
15 plausible claim for relief. *See id.* at 679. A claim is facially plausible when the plaintiff’s
16 complaint alleges facts that allow a court to draw a reasonable inference that the
17 defendant is liable for the alleged misconduct. *See id.* at 678. Where the complaint does
18 not permit the Court to infer more than the mere possibility of misconduct, the complaint
19 has “alleged—but it has not show[n]—that the pleader is entitled to relief.” *Id.* at 679
20 (alteration in original) (internal quotation marks and citation omitted). That is insufficient.
21 When the claims in a complaint have not crossed the line from conceivable to plausible,
22 the complaint must be dismissed. *See Twombly*, 550 U.S. at 570.

23 **IV. DISCUSSION**

24 GAF generally argues that Urban fails to plead any facially plausible claims against
25 it with the specificity required under Federal Rule of Civil Procedure 9(b). (ECF No. 89 at
26 8, 11, 12.) As further explained below, the Court agrees. However, the Court finds that
27 Urban’s claims may be cured by amendment. The Court addresses below GAF’s Motion
28

as to each of Urban's claims against it, and then explains why it will grant Urban leave to amend the claims that the Court agrees should be dismissed.

A. Consumer Fraud/Deceptive Trade Practices Claims

GAF argues that dismissal of this claim is proper because Urban fails to specify how GAF deceived Urban, how Urban relied on GAF's misrepresentations or omissions to its detriment, or how GAF's alleged actions caused Urban's damages. (ECF No. 89 at 8.) Urban counters that it did "specifically" plead a misrepresentation and an omission by GAF as well as its detrimental reliance resulting in damages. (ECF No. 96 at 4, 8-9.) In addition, Urban argues that its consumer fraud claim is facially plausible because reliance upon GAF's actions need not be pleaded with particularity under Rule 9(b). (*Id.* at 8.) The Court ultimately agrees with GAF and grants its Motion as to its consumer fraud and deceptive trade practices claims.

Rule 9(b) provides that when a party alleges fraud, the party must "state with particularity the circumstances constituting fraud," that is, "the who, what, when, where, and how of the misconduct charged." *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019) (citation omitted); *see also Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019) (noting that "the complaint must include an account of the time, place, and specific content of the false representation as well as the identities of the parties to the misrepresentations") (citations and quotation marks omitted). Rule 9(b) applies to state-law claims that "sound in fraud" and "are 'based on a unified course of fraudulent conduct.'" *Motogolf.com, LLC v. Top Shelf Golf, LLC*, 528 F. Supp. 3d 1168, 1174 & n.3 (D. Nev. 2021) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104-05 (9th Cir. 2003)). Both courts within the District of Nevada and the Nevada Supreme Court have applied Rule 9(b)'s heightened pleading standard to consumer fraud/deceptive trade practices claims under Nevada law.² *See, e.g., id.* at 1174 (applying

²While these courts apply two different sets of civil procedure rules—state and federal—to fraud-based claims, the courts' analyses are virtually identical. Indeed, the Nevada Supreme Court has stated that NRCP 9(b) "contains language identical" to its federal counterpart and applies in the same ways. *Rocker v. KPMG LLP*, 148 P.3d 703,

1 Rule 9(b) to consumer fraud, civil conspiracy, and civil aiding and abetting claims because
2 they are all based on the same alleged misrepresentations and thus “sound in fraud”);
3 *see also Switch, Ltd. v. Uptime Inst., LLC*, 426 F. Supp. 3d 636, 642, 644 (D. Nev. 2019);
4 *Gage v. Cox Commc’ns, Inc.*, Case No. 2:16-cv-02708-KJD-GWF, 2017 WL 1536219, at
5 *2 (D. Nev. Apr. 27, 2017); *Davenport v. Homecomings Fin., LLC*, Case No. 56322, 2014
6 WL 1318964, at *3 (Nev. Mar. 31, 2014); *Davenport v. GMAC Mortg.*, Case No. 56697,
7 2013 WL 5437119, at *3 (Nev. Sept. 25, 2013); *Rocker*, 148 P.3d at 708-09.

8 The Court accordingly finds that Rule 9(b)’s heightened pleading standard applies
9 to Urban’s consumer fraud/deceptive trade practices claims because they are both based
10 on the same alleged fraudulent conduct—GAF’s misrepresentations about the Center’s
11 roof being repaired despite knowledge of its previous construction defects. *See, e.g.*,
12 *Motogolf.com, LLC*, 528 F. Supp. 3d at 1174 & n.3 (finding that Rule 9(b)’s heightened
13 pleading standard applies to the plaintiff’s underlying consumer fraud claim because it
14 “sound[s] in fraud” and is based on the same alleged fraud as the civil conspiracy and
15 civil aiding and abetting claims). As explained below, Urban fails to plead its consumer
16 fraud claims with the particularity required by Rule 9(b).

17 To start, rather than identifying the particular time, place, and circumstances of
18 GAF’s alleged deceptions, Urban appears to lump GAF together with the other
19 Defendants and vaguely alleges that GAF defrauded it. (*See generally* ECF No. 65.) This
20 fails to meet the pleading standard. *See Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th
21 Cir. 2007) (stating that “[FRCP] 9(b) does not allow a complaint to merely lump multiple
22 defendants together but ‘require[s] plaintiffs to differentiate their allegations when suing
23 more than one defendant . . . and inform each defendant separately of the allegations
24 surrounding his alleged participation in the fraud”).

25 Further, Urban’s claims stem from installation services, not manufacturing
26 services, under a contract to which GAF was not a party. (ECF Nos. 65 at 2, 7, 11, 96 at
27

28 708-09 (Nev. 2006) (*overturned on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670, 672 (Nev. 2008)).

2.) GAF merely manufactured and guaranteed the roofing materials, which other parties—namely United and its roofing subcontractor—then improperly installed to construct the roof. (ECF No. 65 at 2, 7.) Urban also does not allege that GAF itself installed the roofing system or designed the defective parts. (*See generally id.*) In sum, the Court agrees with GAF that any alleged defects not addressed in its 2015 letter do not give rise to actionable claims because GAF had no duty to Urban regarding roof installation as a non-party manufacturer. (ECF No. 97 at 2-3.)

More specifically, Urban asserts two claims for deceptive trade practices and consumer fraud under NRS §§ 41.600(2)(e) and 598.0915 through 598.0925.³ (ECF No. 65 at 18-19, 21.) NRS § 41.600(1) provides that “[a]n action may be brought by any person who is a victim of consumer fraud.” A deceptive trade practices claim brought under NRS § 41.600(1) requires Urban to show that “(1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff.” *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009); *see also* NRS § 41.600(2)(e) (defining consumer fraud to include deceptive trade practices listed in NRS §§ 598.0915 to 598.0925). To establish “causation,” a plaintiff must allege that it relied on a material misrepresentation that caused the harm. *See Guerra v. Dematic Corp.*, Case No. 3:18-cv-0376-LRH-CLB, 2020 WL 5995496, at *2 (D. Nev. Oct. 8, 2020) (recognizing that “the causation element [under NRS § 41.600] includes reliance,” meaning that “the defendant must have relied on the alleged misrepresentation in order to state a claim under the [statute]”).

Urban fails to sufficiently plead its consumer fraud and deceptive trade practices claims. For example, Urban fails to sufficiently plead the first element of the claim—an act of consumer fraud—with the particularity required by Rule 9(b). Urban instead alleges that GAF misrepresented that the roof was fully repaired, all while failing to disclose its

³Although Urban asserts its consumer fraud and deceptive trade practices claims as two distinct causes of action in the FAC, the Court addresses them as one combined issue because “[c]onsumer fraud” under NRS § 41.600(2)(e) also includes “deceptive trade practices” as listed in NRS §§ 598.0915 to 598.0925. Urban specifically asserts violations of NRS §§ 598.0915(5), 598.0915(7), 598.0915(15), and 598.0923(2)(1)(b). (ECF No. 65 at 18-20.)

1 knowledge of the ongoing construction defects. (ECF No. 65 at 20, 22.) But Urban
2 accordingly fails to allege that GAF engaged in a “deceptive trade practice” by knowingly
3 misrepresenting the quality of its own roofing products, or otherwise making a false
4 representation in connection with a transaction. See NRS §§ 598.0915(5), 598.0915(7),
5 598.0915(15); see *also Gage*, 2017 WL 1536219, at *2 (recognizing that, under Nevada
6 law, “the entirety” of NRS § 598 “only applies to transactions involving goods and
7 services,” and noting that “Plaintiff has not plead that Defendant’s phone calls involved
8 the sale of goods or services.”). As GAF notes (ECF Nos. 89 at 4, 97 at 3), Urban alleges
9 no facts suggesting that GAF engaged in deceptive trade practices about *its own*
10 products, design/installation, or guarantee program.

11 Urban also does not explain how Dermody and United’s original mistakes in 2011
12 implicate a “sale” by or “transaction” with GAF under NRS § 598. See *Gage*, 2017 WL
13 1536219, at *2 (recognizing that, under Nevada law, “the entirety” of § 598 “only applies
14 to transactions involving goods and services”). In fact, the FAC appears to suggest good-
15 faith efforts by GAF to encourage proper repairs. (ECF No. 65 at 25.) Indeed, in its 2013
16 letter, GAF identified which of its own roof assemblies would “meet the wind design criteria
17 of the Property” and informed United that it had used the wrong decking materials against
18 GAF’s own specifications. (*Id.*)

19 Moreover, Urban fails to plead the second element of consumer fraud—
20 causation—with the particularity required by Rule 9(b). Specifically, it is unclear how or
21 when Urban relied on GAF’s deceptions about the roof’s repaired status, and how GAF’s
22 statement caused Urban’s damages. As noted, Urban instead alleges that the roof
23 defects resulted from United’s original design and installation in 2011. (ECF No. 65 at 7.)
24 Yet Urban also alleges that GAF’s failure to address United’s mistakes prevented Urban
25 from “insisting on the proper repairs, which eventually resulted in significant roof damage”
26 in 2019. (*Id.* at 27.) But Urban provides no further details that explain when or how it
27 relied on GAF’s actions to its detriment within this four-year period. Without more details,
28 the Court cannot reasonably infer that GAF’s actions—as opposed to the actions of other

defendants—caused Urban’s damages between 2015 and 2019. In sum, because Urban fails to sufficiently plead either the consumer fraud or causation elements of these claims, the Court grants GAF’s Motion as to Urban’s consumer fraud and deceptive trade practices claim.

B. Civil Conspiracy/Concert of Action Claim

Defendant GAF next argues that Urban’s civil conspiracy claim is subject to Rule 9(b)’s heightened pleading standard, which Urban fails to satisfy. (ECF No. 89 at 10-11.) As to this claim, GAF further argues that its actions, as alleged by Urban, “do not create the basis for a tacit understanding and agreement between parties to engage in the unlawful acts.” (*Id.*) The Court agrees.

To state a valid claim for civil conspiracy, a plaintiff must show: (1) defendants, by acting in concert, intended to accomplish an unlawful objective for the purpose of harming the plaintiff; and (2) the plaintiff sustained damages as a result. *See Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 862 P.2d 1207, 1210 (Nev. 1993) (citations omitted). “While the essence of the crime of conspiracy is the agreement, the essence of civil conspiracy is damages.” *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citation omitted). And “[t]he damages result from the tort underlying the conspiracy.” *Id.* Indeed, “[c]ivil conspiracy requires the existence of an underlying tort.” *Markey v. Bank of Am., N.A.*, Case No. 2:12-cv-00027-LDG, 2012 WL 3317789, at *3 (D. Nev. Aug. 10, 2012) (citing *Flowers*, 266 F. Supp. 2d at 1249). Civil conspiracy claims are also subject to Rule 9(b)’s heightened pleading standard when such claims “sound in fraud” and “are ‘based in a unified course of fraudulent conduct.’” *Motogolf.com, LLC*, 528 F. Supp. 3d at 1174 & n.3. Rule 9(b)’s heightened pleading standard accordingly applies to this claim as well.

Urban’s failure to state an actionable claim for consumer fraud/deceptive trade practices—at least at this point in time—is also fatal to its civil conspiracy claim against GAF because the civil conspiracy claim lacks the requisite underlying claim. *See Markey*, 2012 WL 3317789, at *3 (finding as such in pertinent part). Therefore, GAF’s Motion is also granted as to Urban’s civil conspiracy claim.

C. Civil Aiding and Abetting Claim

GAF finally contends that Urban's civil aiding and abetting claim is also subject to Rule 9(b)'s heightened pleading standards, which Urban fails to satisfy. (ECF No. 89 at 12.) GAF argues that Urban merely recites the elements of a civil aiding and abetting claim and fails to explain how GAF was aware of its role in promoting consumer fraud, or how GAF knowingly and substantially assisted Defendants United and Dermody in its fraudulent conduct. (*Id.*) Urban responds that it pleads an actionable civil aiding and abetting claim because it plausibly alleges United's breach of contract and concealment of defects, and that "GAF aided and abetted that concealment." (ECF No. 96 at 13-14.) The Court agrees with GAF.

Under Nevada law, "liability attaches for civil aiding and abetting if the defendant substantially assists or encourages another's conduct in breaching a duty to a third person." See *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 112 (Nev. 1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Therefore, Urban must allege that: (1) United or Dermody breached their contractual or legal duties to Urban; (2) GAF was aware of its role in assisting or encouraging the breach; and (3) GAF knowingly and substantially assisted United or Dermody. See *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1246, 1261 (D. Nev. 2006). Rule 9(b)'s heightened pleading standard also applies to civil aiding and abetting claims when "they sound in fraud" and "are 'based in a unified course of fraudulent conduct.'" *Motogolf.com, LLC*, 528 F. Supp. 3d at 1174 & n.3. The Court has previously found that Urban's underlying consumer fraud claim "sound[s] in fraud" and is therefore subject to Rule 9(b)'s heightened pleading standard—and it accordingly applies to this claim as well. *Id.*

Urban fails to sufficiently plead the second and third elements of its civil aiding and abetting claim. See *FLS Transp. Serv. (USA) Inc. v. Casillas*, Case No. 3:17-cv-00013-MMD-VPC, 2017 WL 4127980, at *10 (D. Nev. Sept. 18, 2017) (recognizing the three elements of a civil aiding and abetting claim as "breach," "knowledge," and "substantial assistance") (citing *G.K. Las Vegas Ltd. P'ship*, 460 F. Supp. 2d at 1261). As to the claim's

1 first element—breach—the Court can reasonably infer from the FAC that United or
 2 Dermody improperly designed and installed the Center's roof structure during
 3 construction in 2011. (ECF No. 65 at 6-7, 9-10.) However, Urban fails to satisfy the second
 4 and third elements—knowledge and substantial assistance. Specifically, it is unclear in
 5 the FAC how GAF knew of its role in assisting United or Dermody in breaching their duties
 6 to Urban, and Urban similarly fails to explain how or when GAF substantially assisted
 7 United or Dermody in *their* alleged breach. (See *generally id.*) Thus, GAF's Motion is also
 8 granted as to Urban's civil aiding and abetting claim.

9 **D. Leave to Amend**

10 Where the Court grants one or more motions to dismiss, it must then decide
 11 whether to grant leave to amend. The Court has discretion to grant leave to amend and
 12 should freely do so “when justice so requires.” Fed. R. Civ. P. 15(a); see also *Allen v. City*
 13 *of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Nonetheless, the Court may deny
 14 leave to amend if it will cause: (1) undue delay; (2) undue prejudice to the opposing party;
 15 (3) the request is made in bad faith; (4) the party has repeatedly failed to cure deficiencies;
 16 or (5) the amendment would be futile. See *Leadsinger, Inc. v. BMG Music Publ'g*, 512
 17 F.3d 522, 532 (9th Cir. 2008). Facts raised for the first time in a plaintiff's opposition
 18 papers should be considered by the Court in determining whether to grant leave to amend
 19 or to dismiss the complaint with or without prejudice. See *Orion Tire Corp. v. Goodyear*
 20 *Tire & Rubber Co.*, 268 F.3d 1133, 1137-38 (9th Cir. 2001).

21 While Urban does not specifically seek leave to amend in its response to the
 22 Motion, Urban refers to the Nevada Supreme Court's decision in *Rocker v. KPMG LLP*,
 23 148 P.3d 703, to argue that a relaxed pleading standard should apply to this case and
 24 request that, if the Court dismisses its claims against GAF, the Court should permit Urban
 25 to “conduct limited discovery such that an amended complaint alleging fraud with
 26 particularity may be filed.” (ECF No. 96 at 14-15.) Under *Rocker*, where the facts
 27 necessary for pleading fraud with particularity “are peculiarly within the defendant's
 28 knowledge or are readily obtainable by him,” a court may apply a relaxed pleading

1 standard. 148 P.3d at 708 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)).
2 In such a situation, a court may permit the plaintiff to conduct limited discovery such that
3 an amended complaint pleading fraud with particularity may be filed. *See id.* at 709.
4 However, before *Rocker* discovery may be permitted, the plaintiff must: (1) plead
5 sufficient facts to support a strong inference of fraud; (2) aver that a relaxed pleading
6 standard is appropriate; and (3) show in the complaint that the claim cannot be pleaded
7 with more particularity because the necessary information is in the defendant's
8 possession. *See id.*

9 Urban has not demonstrated that a relaxed pleading standard should apply to this
10 case—nor has it demonstrated it is entitled to *Rocker* relief. Because Urban fails to
11 sufficiently plead all the elements of its consumer fraud claim, Urban's allegations do not
12 support a strong inference of fraud. Further, Urban fails to explain why the information it
13 needs to comply with Rule 9(b)'s heightened pleading standard is within GAF's
14 knowledge or possession. Indeed, Urban describes in the FAC its multi-year involvement
15 in the roof repair process with Defendants Dermody and United, who would both likely
16 have direct knowledge of the roof's construction defects. (ECF No. 96 at 15 (referring to
17 ECF No. 65 at 21-22).) And because all parties—Urban, Dermody, United, and GAF—
18 were actively involved in the roof construction and repairs for the Center that Urban itself
19 occupied, Urban should have sufficient knowledge of the relevant facts necessary to
20 support its claim. Thus, *Rocker's* relaxed pleading standard does not apply, and Urban is
21 not entitled to *Rocker* relief.⁴

22 While Urban is not entitled to *Rocker* relief, the Court nonetheless grants Urban
23 leave to amend its complaint because it cannot find that amendment would be futile. To
24 be sure, the Court has granted Urban leave to amend its complaint once before. (ECF
25

26 ⁴The FAC also does not meet the Ninth Circuit's criteria, which applies a relaxed
27 pleading standard to "permit discovery in a limited class of corporate fraud cases where
28 the evidence of fraud is within a defendant's exclusive possession." *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001). Urban does not plead facts suggesting corporate fraud and does not demonstrate that any evidence of fraud is within GAF's exclusive possession.


1 No. 63 at 22-23.) However, the FAC reflects the first time Urban has brought claims
2 against GAF, and Urban has not previously failed to cure deficiencies as to these specific
3 claims. (ECF No. 65 at 18-27.) Therefore, leave to amend is appropriate with respect to
4 Urban's claims against GAF. Urban must file its second amended complaint containing
5 amended allegations against GAF within 30 days.

6 **V. CONCLUSION**

7 The Court notes that the parties made several arguments and cited to several
8 cases not discussed above. The Court has reviewed these arguments and cases and
9 determines that they do not warrant discussion as they do not affect the outcome of the
10 Motion before the Court.

11 It is therefore ordered that Defendant GAF Materials Corporation's motion to
12 dismiss (ECF No. 89) is granted but the Court grants Urban leave to amend. Urban must
13 file its second amended complaint containing amended allegations against GAF within 30
14 days. Failure to do so will result in dismissal of the claims against GAF with prejudice.

15 DATED THIS 12th Day of September 2022.

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19 _____
20 MIRANDA M. DU
21 CHIEF UNITED STATES DISTRICT JUDGE
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